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No. 08-163

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

GEORGIA MCCANN,

Petitioner,

v.

SAM-COCHRAN, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this case presents the Eleventh Circuit's "nearly identical" standard for comparators in Title VII disparate treatment cases where the lower courts' decisions found the comparators' behavior too significantly and qualitatively different from Petitioner's?

PARTIES

Pursuant to Rule 24.2, Respondent accepts Petitioner's statement of the parties.

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OPINIONS BELOW

Pursuant to Rule 24.2, Respondent accepts Petitioner's citations to the opinions below.

STATEMENT OF JURISDICTION

Pursuant to Rule 24.2, Respondent accepts Petitioner's statement of jurisdiction.

STATUTES INVOLVED

Pursuant to Rule 24.2, Respondent accepts Petitioner's statement of the statutes involved.

STATEMENT OF THE CASE

A. Proceedings Below

Petitioner, Georgia McCann (hereinafter, "McCann") commenced this action by filing a complaint in the United States District Court of the Southern District of Alabama on June 22, 2005. The complaint generally alleged Title VII race-discrimination and retaliation claims against Respondents, as well as similar claims made pursuant to 42 U.S.C. §§ 1981 and 1983. In relevant part,[1] the summary judgment as to the

[1] The procedural history of this case is somewhat complex, as the Mobile County Personnel Board was also a defendant,

(Continued on following page)

claim allegedly at issue in this petition – McCann's Title VII disparate treatment claim – was entered on July 6, 2006 and subsequently affirmed by the Eleventh Circuit on May 9, 2008. The instant petition timely followed.

B. Statement of the Facts

The facts underlying McCann's disparate treatment claim are quite simple. On June 1, 2004, McCann learned her son was in the Washington County Jail. (App. 27a). McCann called her supervisor, requested an "emergency vacation day" to deal with this situation, was granted the requested leave, and proceeded to the Washington County Jail. (App. 27a). McCann wore her uniform to the Washington County Jail in violation of a directive issued in 2003 that forbade Mobile County Sheriff's Office employees from wearing their uniforms except at work and on their way to and from work. (App. 27a). Nothing more might have come of this, except that Sheriff Wheat of Washington County wrote a letter to the Mobile County Sheriff on June 4, 2004 complaining about McCann's behavior at the Washington County Jail. (App. 27a). In particular, Sheriff Wheat complained that McCann had behaved "irrationally and disrespectfully" toward both him and his deputies,

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and a separate interlocutory appeal was taken by Respondents on the issue of qualified immunity with regard to the claims made under sections 1981 and 1983.

made false accusations about them, and generally tried to use her status and uniform as a Mobile County corrections officer in an attempt to influence the bonding and release of her son. (App. 27a). A pre-disciplinary panel subsequently found McCann guilty of several charges based on this incident. (App. 27a). McCann subsequently appealed to the Mobile County Personnel Board which sustained the findings of the pre-disciplinary panel. (App. 27-28a).[2] The June 1, 2004 incident and the discipline which resulted from it – a suspension without pay for 10 days – form the factual basis for the disparate treatment claim which is the sole issue on this petition.

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[2] The "truth" of the allegations against McCann with regard to this incident are of course not strictly relevant to McCann's disparate-treatment claim. This being said, the district court noted pointedly that the evidence presented to the Mobile County Personnel Board overwhelmingly showed that McCann was in fact guilty of being irrational and discourteous to Sheriff Wheat and his staff, and that the evidence strongly supported the proposition that she had used her uniform and position in an attempt to influence the bonding and release of her son. (App. 28a n.3). The district court also noted that the evidence was somewhat more evenly divided as to the issue of whether McCann was aware of the uniform directive which she undisputedly violated on that occasion, but it was still more than strong enough to support the finding that she did actually know about it – particularly given the fact that McCann resisted the bonding company's efforts to photograph her on that occasion and that she attempted to disguise her uniform when her picture was actually taken. (App. 28a n.3).

SUMMARY OF THE ARGUMENT

This case does not implicate the Eleventh Circuit's "nearly identical" rule applicable to Title VII disparate treatment employment discrimination cases. McCann broadly claims she was subjected to racial discrimination in her employment as a corrections officer for the Mobile County Sheriff's Office. McCann incorrectly states that the district court and the Eleventh Circuit dismissed her disparate treatment claim because the similarly-situated comparators she identified were not "nearly identical." (Pet. Br. at 1-2). In fact, both the district court and the Eleventh Circuit dismissed McCann's claims because the comparators she identified were in fact "qualitatively different" and because McCann's conduct was "plainly . . . more serious than that of her comparators." (App. 9-10a, 33a). In other words, McCann's claims were dismissed because her comparators were not "similarly situated" to her under any standard, let alone the "nearly identical" standard applicable in the Eleventh Circuit. As a result, this case does not properly present any question regarding the applicability of the "nearly identical" standard.

Respondents must also take issue with McCann's characterization of the undisputed factual background necessary to the resolution of this case. McCann's brief lacks any clear explanation of the incident which led to the disciplinary action taken against her. (*See* Pet. Br. at pp. 3, 5). The actual gravamen of McCann's discipline was abuse of her position and uniform in acting "irrational and

disrespectful" toward the Sheriff of Washington County (which is adjacent to Mobile County) when she showed up at the Washington County Jail in her uniform while trying to secure the release of her son – and not a mere technical violation of a uniform directive. (App. 2a, 27a). The disciplinary process relevant to this case occurred only after Sheriff Wheat of Washington County wrote to the Mobile County Sheriff formally complaining about McCann's behavior. (*Id.*). Beyond this significant omission, McCann chooses to open the factual portion of her brief with the assertion that Sheriff Tillman (the former Sheriff of Mobile County) at some point in time "openly referred to blacks as 'niggers,'" and attempts to imply therefrom that the lower courts should have addressed her argument that "pretext can be shown through language demonstrating discriminatory animus[.]" (Pet. Br. at pp. 1-2, 4, 6-7). In doing so, McCann is merely trying to confuse and inflame the issue, and in fact, clearly misstates the Eleventh Circuit's legal analysis of her disparate treatment claim by importing part of that court's discussion addressing her Title VII failure-to-promote claim. (App. 10a).

ARGUMENT

A. THE "NEARLY IDENTICAL" STANDARD IS NOT AT ISSUE BECAUSE THE LOWER COURTS' DECISIONS TURNED ON FACTUAL DETERMINATIONS THAT FORECLOSE PETITIONER'S CLAIMS EVEN ON LOWER STANDARDS

Petitioner's argument for *certiorari* in this case rests on a fundamentally flawed premise: that the Eleventh Circuit's "nearly identical" standard applicable to similarly-situated comparators in Title VII disparate treatment cases was necessary to the lower courts' disposition of her claim. *Burke-Fowler v. Orange County, Fla.*, 447 F.3d 1319, 1323 (11th Cir. 2006) (describing elements of *prima facie* disparate treatment claims and discussing "nearly identical" standard applicable to third element of same). It is true that McCann would have had to show a "nearly identical" comparator for purposes of this test to prove disparate treatment in the Eleventh Circuit. What the opinions below make crystal clear is that McCann did not even meet substantially more lenient tests for making a *prima facie* case, and in fact, her proffered comparators were "glaringly" different. (*See* App. 31a). In short, this case does not properly present any controversy regarding the "nearly identical" standard as McCann claims it does, and *certiorari* is inappropriate for this reason alone.

In its opinion on McCann's disparate treatment claim, the Eleventh Circuit noted that the comparators identified by McCann were in fact "qualitatively

different" from her in the seriousness of their offenses. (App. 9-10a). The first comparator, one Marnita Coleman, was not disciplined after she got into an altercation with her daughter-in-law. (App. 8-9a). The altercation took place at Coleman's residence. (App. 31a). Coleman was not in uniform. (App. 9a). After some dispute with her daughter-in-law and deputies that were called to the scene, Coleman was arrested and charged with disorderly conduct and conduct unbecoming. (App. 8a). Both the Eleventh Circuit and the district court, "[m]ost notably" found that Coleman had not engaged in any activity or use of her position "in an effort to obtain a personal goal[.]" (App. 9a, 31a). It is particularly in view of these differences which the district court termed "glaring" – the private versus public nature of the underlying incidents, the fact that McCann committed her offense while wearing her uniform, the fact that McCann's behavior was directed against a public official of a neighboring county as opposed to a family member, and most importantly, that McCann was attempting to use her uniform and position in an attempt to derive advantageous treatment from that public official – that McCann's behavior must be viewed. (*See* App. 31a). It is quite clear that McCann's behavior as compared to Coleman's was substantially and glaringly different, and thus fails even to meet a much lower standard than the "nearly identical" standard which McCann attempts to challenge here.

The same conclusion obtains with McCann's other proffered comparator, Jonathan Lindsey.

Lindsey received a written reprimand for being rude to a nurse who was attending to an inmate Lindsey was escorting. (App. 9a). Specifically, Lindsey "used vulgar language and made unprofessional statements" to the nurse, who he believed was being unprofessional in her interactions with the inmate. (App. 31a). Lindsey was in uniform but was on duty and therefore was not in violation of the uniform directive. (App. 9a, 32a). Lindsey directed any inappropriate statements to a civilian, and not a high-ranking public official from another county. (App. 9a, 31a). Perhaps most importantly however, again, Lindsey was not attempting to use his official position and uniform to his personal advantage. (App. 9a, 31a). Although Lindsey obviously committed a breach of etiquette and perhaps an error in professional judgment, his behavior is in no way comparable to the behavior for which McCann was disciplined: he did not abuse his uniform or position for personal gain as McCann undisputedly did.

McCann has offered the Court an extensive petition explaining her counsel's views on the supposed circuit split in regard to the "nearly identical" standard. (*See* Pet. Br. at pp. 10-40). Certainly, many interesting things could be said on the subject – in a case that actually presented the controversy. Unfortunately, McCann never explains precisely how this case actually presents the issue. This is because in light of the Eleventh Circuit's and the district court's opinions on the purely factual aspects of this case, it is abundantly clear that this case does not.

B. PETITIONER HAS MISSTATED THE MATERIAL FACTS APPLICABLE TO HER DISPARATE TREATMENT CLAIM

Beyond the legal inapplicability of the vast bulk of McCann's petition, Respondents must point out that much of her argument relies on two improper strategies. First, McCann fails to completely state the factual background essential to the lower courts' resolution of her claim. Where this tactic fails, McCann engages in a shell game in which irrelevant and unsupported – though certainly inflammatory – assertions are substituted for legal argument.

As to McCann's habit of severely understating the facts relevant to the lower courts' decisions, McCann only vaguely mentions (in discussing the incident which gave rise to the disciplinary action against her) that she "disapproved" of the Washington County Sheriff's practices in arresting her son and that she said this to the Washington County Sheriff along with a sarcastic comment. (*See* Pet. Br. at p. 3). McCann does not bother to describe the incident or precisely why she was disciplined any further. (*Id.*). What McCann fails to mention, and what the lower courts specifically recognized, is that the event that prompted the discipline was the fact that Sheriff Wheat of Washington County wrote a letter to the Mobile County Sheriff's Office complaining about McCann's behavior on the occasion in question, including her irrational and disrespectful behavior toward Sheriff Wheat and his deputies, and her false accusations of misconduct. (App. 2a, 27a). In

other words, this is obviously not a case where the disciplinary process originated internally within the Mobile County Sheriff's Office or even within Mobile County itself: a neighboring public official specifically initiated the investigation and resulting disciplinary process by making a complaint about McCann. It hardly needs mentioning that Sheriff Wheat is not a respondent in this case and this alone, as a purely factual matter, should defeat any claim based on this incident as against the Mobile County Sheriff.

Furthermore, the gravamen of the complaint and discipline levied against McCann was clearly not a mere technical violation of Mobile County Sheriff's Office directives or else vague "conduct unbecoming" accusations. It was clear that she used her uniform and position in an abusive manner and in an attempt to gain a personal advantage. (App. 9a, 31a). McCann is attempting to divert the analysis away from the actual conduct that caused her discipline and into claims that her conduct should be comparable, for purposes of a disparate treatment claim, to anyone who was disciplined for some (though not all) of the same technical violations. Such an approach would mean that almost every disparate treatment claimant under Title VII could find a comparator allegedly guilty of "similar" conduct who was in the end treated differently. Such a result – which would in effect mean that any Title VII plaintiff would be able to make a *prima facie* case regardless of the underlying facts or their comparative severity – would be frankly absurd.

Finally, Respondents must comment on McCann's transparent strategy of using "hot button" and charged terms – specifically in this case, the term "nigger" – straight at the opening of her brief without any real attempt to relate it to her unquestioned burden of satisfying the third prong of the *Burke-Fowler* test applicable in the Eleventh Circuit. Specifically, McCann opens the substantive portion of her brief by stating that this case concerns the "nearly identical" standard applicable in the Eleventh Circuit and then immediately goes on to note that the Sheriff of Mobile County allegedly "openly referred to blacks as 'niggers.'" (Pet. Br. at pp. 1-2, 4). No further attempt to relate this inflammatory assertion to any actual legal argument or standard is made in the petition. In fact, the former Sheriff of Mobile County alleged to have made these comments, Jack Tillman, is never even referred to at any other point. The closest McCann comes to relating this piece of irrelevancy to any legal issue is the assertion that the lower courts refused to consider "racially biased remarks cited by McCann" because she did not "ma[ke] out a prima facie case of racial discrimination[.]" (Pet. Br. at p. 7). If one checks the citation to the portion of the Eleventh Circuit's opinion offered for this proposition, it is obvious that the panel only made this statement with reference to McCann's discriminatory-failure-to-promote claim, an essential element of the *prima facie* showing for which is a showing that other less qualified persons who were not members of the protected class were promoted above the plaintiff. (*See* App. 10a n.6)

(*citing Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1089 (11th Cir. 2004)). The allegedly "less qualified" persons cited by McCann for purposes of her discriminatory-failure-to-promote claim were both black, an obvious and fatal flaw to that particular *prima facie* showing. (*Id.*). Needless to say, that *prima facie* showing is not at issue in this appeal, and is entirely different from the *prima facie* showing McCann failed to make for her disparate treatment claim. In other words, McCann imports a completely unrelated issue solely for the purpose of opening her brief with the charged term "nigger" in the hopes that this Court will thereby not notice the utter lack of a factual basis for her disparate treatment claim.

CONCLUSION

McCann's petition, while being in bulk a learned treatise on the state of the law as regards varying standards applicable to Title VII disparate treatment claims, fails to present any issue related to the "nearly identical" standard applicable in the Eleventh Circuit because McCann cannot make out a *prima facie* case under any standard. Instead, McCann has under or misstated the factual background of her disparate treatment claim, or else attempted to insert inflammatory allegations into her petition as a substitute for any application of the material facts to the law. Her petition is due to be denied by this Honorable Court.

Respectfully submitted,

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